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No. 88-328

In the Supreme Court of the United States

OCTOBER TERM, 1988

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
PETITIONER

v.

JAMES R. RICHARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner challenges the court of appeals' ruling that the Inspector General of the Department of the Interior has express authority under an Act of Congress to conduct an audit of petitioner, a local court of a United States territory established under Article IV of the United States Constitution, and that such auditing authority does not violate the constitutional separation of powers.

1. In January 1987, respondent James R. Richards, who is the Inspector General of the Department

of the Interior, caused a subpoena to be served on petitioner, the Territorial Court of the Virgin Islands (Pet. App. 17a).[1] The subpoena, which was issued in furtherance of the Inspector General's audit of petitioner, called on petitioner to produce for examination records that showed how the court recorded the collection of revenues, accounted for its expenditures and purchases, recorded and collected fines, managed escrow accounts where bail monies were deposited, kept control of its equipment and other assets, and maintained time, attendance, and payroll records (*id.* at 16a-17a). Petitioner's records had on several prior occasions been included in audits by the Inspector General (*id.* at 19a), and petitioner's predecessor court, the Municipal Court of the Virgin Islands, had also been audited by the Department of the Interior (*id.* at 30a-31a & n.9).

Petitioner filed a complaint in the District Court of the Virgin Islands seeking declaratory and injunctive relief against the subpoena and any audit. Respondents counterclaimed for enforcement of the subpoena and shortly thereafter moved for summary enforcement. In support of the motion for enforcement, respondents established that the subpoena meets the three-pronged test applicable to subpoenas like the one at issue. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946); see also *United States* v. *Westinghouse Electric Corp.*, 788 F.2d 164, 166 (3d Cir.

[1] The subpoena was served by Neal Littlefield, the other named respondent in this case, who was the Caribbean regional audit manager for the Inspector General at the time. See Pet. App. 16a.

1986) (test applied to Inspector General subpoenas). In particular, respondents showed, and the district court concluded (Pet. App. 26a-32a), that the subpoena is authorized by the Insular Areas Act of 1982, which requires the Inspector General to maintain a "satisfactory level of independent audit oversight" of the accounts of the government of the Virgin Islands and provides that "[t]he authority granted * * * shall extend to all activities of the government of the Virgin Islands, and shall be in addition to the authority conferred * * * by the Inspector General Act of 1978." 48 U.S.C. 1599. The Inspector General Act of 1978 in turn authorizes the use of a subpoena to fulfill the Inspector General's responsibilities. 5 U.S.C. App. 6(a)(4).[2]

2. The court of appeals, like the district court, rejected petitioner's contention that only the Administrative Office of the United States Courts, and not the Inspector General of the Department of the Interior, is statutorily authorized to audit the Territorial Court (Pet. App. 3a-6a). The court first held, contrary to petitioner's suggestion, that the Inspector General's statutory authority to audit "all activities of the government of the Virgin Islands" (48 U.S.C. 1599) is not limited to activities of the executive departments of the Virgin Islands government. The

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[2] With respect to the second and third prongs of the test laid down in *Powell* and *Westinghouse*, respondents demonstrated the relevancy of the documents sought and the steps taken to avoid any undue burden on petitioner. Petitioner presented no evidence suggesting that the subpoena might be burdensome or that the documents sought were not relevant (Pet. App. 9a-10a). The district court (*id.* at 32a) and the court of appeals (*id.* at 9a-10a) found that respondents had satisfied those requirements, which are not at issue in this Court.

court noted "the breadth of the language employed in the statute and the lack of any valid reason" why Congress would choose to exclude the Virgin Islands judiciary or legislature from federal audit scrutiny (Pet. App. 6a). The court of appeals similarly rejected petitioner's contention that the "except" clause of 48 U.S.C. 1544 establishes that only the Administrative Office of the United States Courts is authorized to audit the Territorial Court. That section places in the Secretary of the Interior responsibility for all Virgin Island government matters "except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts." The court of appeals explained (Pet. App. 7a) that the "except" clause does not apply to petitioner, because the Territorial Court was not under the supervision of the Administrative Office on July 22, 1954, and, indeed, has never been under that Office's supervision. Thus, insofar as the Virgin Islands are concerned, the Administrative Office's authority, which is set forth in 28 U.S.C. 604(a)(11), 610, extends only to the District Court of the Virgin Islands.

The court of appeals also rejected petitioner's argument that an audit of the Territorial Court by an executive agency violates the constitutional doctrine of separation of powers (Pet. App. 7a-8a). Congress established the present Virgin Islands government in the exercise of its power under the Constitution (U.S. Const. Art. IV, § 3, Cl. 2) to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The court of appeals "[a]ssum[ed], without deciding, that separation of powers principles may be viable as among the branches of the territorial government"

(Pet. App. 8a). But the court of appeals concluded, following the district court (*id.* at 24a-26a), that such principles do not constrain Congress in its authority to legislate for the territories (*id.* at 8a).

3. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision raise any question of general importance. Indeed, the Third Circuit and the District Court of the Virgin Islands are uniquely positioned to speak authoritatively on questions peculiar to the Virgin Islands. In this case, moreover, the concurrent judgment of both lower courts is correct and does not warrant further review.

The Inspector General has express statutory authority under 48 U.S.C. 1599 to audit "all activities of the [Territorial] government." As the court of appeals explained (Pet. App. 6a), that language does not contain an exception for the judicial (or legislative) branch of the territorial government.[3] Cf. *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988) (phrase "United States" in 28 U.S.C. 518(a) is not restricted to Executive Branch). Nor, as the court of appeals also noted (Pet. App. 6a), is there anything about the function of auditing—or the prospect of the Inspector General's auditing the Territorial Court—that would suggest that Congress must have intended a narrower meaning than the

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[3] Petitioner suggests (Pet. 10) that the "common sense" reading of the phrase, "government of the Virgin Islands," would construe it to refer only to the executive branch. But that view is contradicted by the language of the Revised Organic Act as a whole. For example, Congress provided that the "government of the Virgin Islands shall have the powers set forth in this chapter" and then enumerated powers that are obviously legislative or judicial in nature. 48 U.S.C. 1541. See also Pet. App. 30a.

broad statutory language suggests. In fact, as the district court explained (*id.* at 29a), the practice of the Inspector General's predecessor had been to audit the local territorial court, and Congress presumably acted with knowledge of existing audit practices when it transferred the auditing authority, without limitation or alteration, to the Inspector General in 1982.

The statutes relevant to the Administrative Office's powers offer no more support for petitioner's contention. Thus, as the court of appeals noted (Pet. App. 7a), Sections 604(a)(11) and 610 of Title 28, U.S.C., expressly authorize the Administrative Office to audit the District Court of the Virgin Islands; they do not mention the local Territorial Court. And the "except" clause of 48 U.S.C. 1544 does not take petitioner outside the jurisdiction of the Secretary of the Interior, because petitioner was not in 1954, and has never been, under the supervision of the Administrative Office (Pet. App. 7a). Indeed, whereas the Inspector General and his predecessor (the government comptroller) have regularly asserted authority to audit the local Territorial Court, the Administrative Office has never asserted such authority (Pet. 17 n.19).

The lower courts were also correct in rejecting petitioner's constitutional claim that the audit proposed is inconsistent with the separation of powers. The doctrine of separation of powers concerns the relations between the co-equal branches of the national government, branches that are established directly by the Constitution and not by Congress. The doctrine has no application—and petitioner does not show that it has ever been applied—to restrict Congress's power to define the "vertical" relationship between the national government and a territorial gov-

ernment, the latter of which is created not by the Constitution but by Congress pursuant to its plenary territorial-legislation power (U.S. Const. Art. IV, § 3, Cl. 2). The Territorial Court here is not an Article III court (see *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *United States* v. *Canel*, 708 F.2d 894, 896 (3d Cir.), cert. denied, 464 U.S. 852 (1983); *United States* v. *George*, 625 F.2d 1081, 1089 (3d Cir. 1980); *Government of Virgin Islands* v. *Bell*, 392 F.2d 207, 209 (3d Cir. 1968)) and so is not part of one of the three co-equal branches of the national government to which the separation of powers doctrine applies. In any event, an audit such as is proposed in this case does not seriously threaten the judicial functions and independence that the separation of powers doctrine protects. The court of appeals concluded that the Territorial Court made no showing that the audit would be impermissibly intrusive or that it would even be burdensome (Pet. App. 10a), and the district court specifically noted that it would be "hard pressed to find here the potential for disruption" of the court's business (*id.* at 26a).[4]

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[4] Petitioner suggests (Pet. 24-27) that the Court hold the present petition pending resolution of *Barnard* v. *Thorstenn*, No. 87-1939, and *Virgin Island Bar Ass'n* v. *Thorstenn*, No. 87-2008, because the Court may in those cases address the relationship between the Territorial Court and the District Court of the Virgin Islands. But the question presented in those cases concerns the validity of a local residency requirement for the practice of law and has no bearing on the question presented by petitioner. Whatever the result in the *Thorstenn* cases, and whatever discussion there might be in those cases of the relation between the District Court and Territorial Court, the court of appeals' ruling rejecting petitioner's statutory and constitutional challenges to the Inspec-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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tor General's auditing authority would remain correct. Accordingly, the present petition should not be held pending resolution of the *Thorstenn* cases.

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